**Before The**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| Implementation of the Telecommunications Act of 1956: | ) | |
| Telecommunications Carriers' Use of Customer Proprietary Network Information And Other Customer Information; | ) | CC Docket No. 96-115 |
| Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended; | ) | CC Docket No. 96-149 |
| 2000 Biennial Regulatory Review- Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers | ) | CC Docket No. 00-257 |

**THE ARIZONA CORPORATION COMMISSION'S OPPOSITION TO THE PETITIONS OF VERIZON AND AT&T WIRELESS FOR RECONSIDERATION OF THE THIRD REPORT AND ORDER IN CC DOCKET 96-115**

Pursuant to Section 1.429(f) of the Federal Communications Commission's (the "Commission" or "FCC") rules. the Arizona Corporation Commission ("ACC") hereby submits this Opposition to the Petitions for Reconsideration of the Commission's *Third R&O* filed by Verizon Communications Inc., and AT&T Wireless Services, Inc.("AT&T") Specifically. the ACC requests that the Commission not reconsider its decision that State regulations that are inconsistent with the Commission's will not be presumed preempted but *will* be considered for *preemption* on a *case-by-case* basis.



## I. Introduction

Verizon and AT&T ask the Commission to reconsider its order and to make clear that all state rules applying standards not consistent with those of the Commission are presumptively preempted.[1] Verizon. relying primarily on the *Computer II* case, argues that the goal of the Commission's regulatory scheme will be thwarted by any State regulation that is

[1] *See Verizon s Petition for Reconsideration of Third Report and Order in CC Docket No 96-115* at 1, October 21, 2002 (Verizon Petition)

inconsistent with the Commission's.[2] AT&T asserts that the Commission has two bases for presumptive preemption: (1) the cost to carriers of complying with differing Slate and Federal regulation, and; (2) "the Commission's own interpretation of the First Amendment's application in the CPNI context provides a strong reason to ensure that states do not impose undue burden on carrier's commercial speech."[3] The ACC believes States may during their consideration of CPNl regulation have before them a record that demands an approach differenl from that of the Commission to achieve a proper balance between privacy rights of consumers and the burden imposed on carrier's commercial free speech rights. Further, the ACC believes while the costs of complying with both Federal and State law could be considered it is not a consideration which demands presumptive preemption.

**II.** Stales **May** Adopt **More** Restrictive CPNl **Approaches** Tban **the** FCC's **Which** Pass Constitutional **Muster Under *Central Hudson.***

The Commission in its *Third R&O*,[4] adopted an approach to its enforcement of section 222 of the 1996 Act, which it believes comports with the United States Court of Appeals for the Tenth Circuit's holding that any approach to enforcement of the provision must meet the test for protection of commercial free speech announced in *Central Hudson.*[5] The Commission adopted its CPNl policy balancing competing privacy, competitive, and First Amendment rights, based on the record before it. **As** stated by the Commission, the Commission "must acknowledge that states may develop different records should they choose to examine the use of CPNI for intrastate services."[6] The Commission in declaring its intent to review stale CPNI rules for preemption on a case-by-case basis properly recognized a Stale commission may have before it a record that would allow the stale to impose constitutional, stricter regulations regarding CPNl notice and disclosure

The Commission reconfirmed its earlier decision to preempt state regulation "where such regulation would negate the Commission's exercise of its lawful authority because

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[2] Verizon Petition at 7-9
AT&T Petition at 4-5
[4] *Implementation of the Telecommunications Act of 1996 Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket No. 96.115, FCC 02-214 (rel July 25, 2002) (Third R&O")
[5] *U.S. West, Inc. v FCC*, 182 F.3d 1224 (10th Cir. 1999), *Cert. denied*, 530 U.S. 1213 (June 5.2000).
[6] Id at ¶ 71.

regulation of the interstate aspects of the matter cannot be severed from regulation of the intrastate aspects."[7] In its Third Repon and Order. however! the Commission removed any presumption thai more stringent state CPNl requirements would be "vulnerable to preemption."[8]

**As** a result of the Tenth Circuit's decision in *U.S. West* v. *FCC*, any approach adopted by either the FCC or a state commission must survive the scrutiny of a *Central Hudson* analysis.[9] This analysis must take into account the burden of the selected approach on protected commercial speech, balancing camers' commercial speech riphts with consumers' privacy rights. The State must be guided by the facts in the record before it. In the course of its investigation, the State may find more evidence of harm to consumers: less burden of commercial speech, or a higher privacy interest reflected in its record than that *reflected on* the FCC's record. Any one. or a combination of any of these findingd, shifis the balance between carrier commercial speech rights and consumer privacy rights and may lead a stale to the supportable conclusion, based on its own *Central Hudson* analysis: that stricter approaches lo protection of consumer CPNl are not constitutionally forbidden based its record. The record in Arizona's consideration of CPNl illustrates this point.

### A. More Evidence of Harm

Arizona's record shows that Qwest did not provide **a** bilingual notification or access to bilingual operators in its opt-out program for the twenty-five percent of Qwest's Arizona customers who speak Spanish. The opt-out notice was included in information concerning the implementation of new area codes. and so it was ofien overlooked as customers read the area code information but did not read the CPNJ notice. The notice did nor make clear to whom CPNl would be released and how it would be used by the receiving pany. The net effect of these shortcomings is that consumers are harmed because they have been afforded no real opportunity to protect their privacy interest in their CPNl as required under Section **222**

[7] Third CPNJ Order at ¶ 69 quoting *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) (*CPNI Order*).
[8] Third CPNJ Order at ¶ 70.
[9] *See U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *Cert. denied*, 530 U.S. 1213 (June 5, 2000).

**B.** Less **Burden** on Carrier Speech

The state may adopt an approach concerning a particular disclosure of CPNl that has less burden on speech. Arizona, in its petition for reconsideration, has asked the Commission to reconsider its stance on release of CPNI to unaffiliated third parties.[11] The Arizona Commission. based on its record, finds that carriers are not currently engaged in the release of CPNl to unaffiliated third parties. The ACC believes it would be difficult, if not impossible: to adequately inform the customer of all of the potential disclosures that could occur under a policy which allowed disclosure to any unrelated third party without written consent prior to each specific release. Because camers in Arizona have indicated they are not currently engaged in such disclosure, the burden on speech would be minimal.

**C.** Increased ***Privacy Interests***

States may have established an interest in privacy beyond that provided under the Federal Constitution. For instance. as specifically noted by the FCC,[11] Arizona citizens enjoy a state constitutional right to privacy.[12] Consideration of Arizonans' rights to privacy in their CPNl led the Arizona Legislature to provide "that, notwithstanding any other law, customer information, account information and related proprietary information are confidential unless specifically waived by the customer in writing."[13] Arizona consumers have expressed serious concerns regarding dissemination of their CPNl by camers in Arizona. Their constitution and statutes reflect an interest in the protection of their private affairs that is greater than that afforded them by their federal constitution and laws. Because Stales may develop different records in their examination of CPNl for intrastate services, the FCC's choice not to apply an automatic presumption is the correct one.

## 111. **Inconsistent** Slate **CPNI** Regulation **Will Not Necessarily Interfere With** the **Goal** of the **FCC's CPNI** Regulator!, Scheme.

[11] **Arizona** Corporation Commission's Petition for Clarification and/or Reconsideration of the Third CPNl Order, November 7, 2002.
[11] **Third** CPNI Order ai ¶71 n.164.
[12] Article II, § 8 *ai* the Arizona Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home **invaded,** without authority of law."
[13] A R S § 40-202.C.5

Verizon relies on the justifications expressed by the FCC, and agreed with by the Court of Appeals for !he District of Columbia,[14] Tor preempting inconsistent state regulation respecting the tariffing of CPE.[15] io support its argument that the Commission must preempt all inconsistent CPNl regulation.[16] The justification advanced by the Commission in *Computer II* was that the "objectives of the *Computer II* scheme would be frustrated by slate tariffing of CPE."[17] The Commission in *Computer II*, found that the "efficient utilization and full exploitation of the interstate telecommunications network" was advanced by encouraging competition in the CPE market.'* The Commission found that only when CPE and transmission charges were completely separate would customers select the CPE most suited to thai individual customer from among the competitors marketing CPE.[19] The Commission concluded that inclusion of any CFE charges, whether CPE used for intrastate or for interstate purposes, would influence consumer choice and be harmful to competition.[20] The Commission's approach lo advancing competition in the CPE market was lo adopt a federal regulatory scheme of removing CPE from tariffs. The only way to ensure CPE was no longer tariffed was to preempt states from doing so. The D.C. Circuit agreed, stating ihat "when slate regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting slate regulations must necessarily yield to the federal regulatory scheme."[21]

The goal of the federal regulatory scheme concerning CPNI is to adopt a method of customer notice and approval while "balanc[ing] carriers' First Amendment rights and consumers' privacy interests so a5 to permit carriers flexibility in their communications with their customers while providing the level of protection io consumers' privacy interests thai Congress envisioned under section 222."[22] As the Commission has noted, and the **ACC** has affirmed above, a record may be established at the Slate level thai causes some shifi in the

[14] *See Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (1982).
[15] *Amendment of Section 64.702 of the Commission's Rules and Regulations* ("Computer II"), Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512, ¶ 83 n.34 (1981).
[16] See Verizon Petition at pp. 7-12.
[17] *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d at 214.
[18] *Computer II Final Decision*, 77 F.C.C.2d at 429.
[19] *Id.* at 442-43.
[20] *See id*
[21] *Io*
[22] Third CPNl Order at ¶ 1

balance between the carrier's First Amendment rights and consumer's CPNI privacy interests, such as a *demonstration of* increased harm to the consumer. a higher privacy interest based on State law, or a lesser burden on carrier speech. A State may reasonably conclude based on such a record that an approach different from that adopted by the FCC, possibly an approach requiring opt-in and/or an approach requiring opl-in for each disclosure lo any unaffiliated third party, properly balances the competing interests and fulfills the goal of Section 222 of the Acr. In other words, there are *different* approaches to achieve the same regulatory goal of Section 222. Unlike. the CPE tariffing case: these approaches can co-exist without interfering with one another

It is also important to note that the preemption issue considered in *Computer II* was not whether or not the FCC was required to preempt: but rather the issues concerned the *FCC's jurisdiction* and *justification for preemption.*[23] The holding of the case means that the FCC has the jurisdiction to and with justification may preempt inconsistent state law when that state law would interfere with achievement of a federal regulatory goal. It does not stand for the proposition that under any particular set of facts the FCC must presumptively preempt inconsistent state regulation. The ACC believes it is clearly *within* the Commission's *discretion* to choose to review inconsistent slate law for preemption on a case-by-case basis. It is particularly appropriate for the Commission to do so when it *is* clearly within the realm of possibility, as it is here: that differing State and Federal Regulation may co-exist and work toward the same regulaiory goal

## IV. The Cost io Carl-iers of Complying With Inconsistent State Law Should Not Determine the FCC's Preemption Approach.

AT&T argues that the *Third R&O* has eliminated an existing presumption of preemption without determining the cost burdens supporting a prior presumption of preemplion had lessened.[24] The ACC does not believe it was necessary for the Commission to determine the burden of complying with *different* state CPNI approaches had lessened in its consideration of the *Third R&O* lo have reasonably concluded the

[23] *See Computer II*, 693 F.2d at 214
[24] AT&T Petition at 4.

presumption should be removed. In its ***Second*** *R&O*, the Commission adopted an opt-in approach to the notice and disclosure of consumer CPNI. In that context, the Commission also stated that any state CPNI regulation containing stricter limitations would be "vulnerable to preemption."[25] On reconsideration of the ***Second*** *R&O*, the ***Commission*** again stated that additional limitations would be subject to preemption while affirming its intent to implement an opt-in approach.[26]

The Commission noted in the *Third R&O* that under the opt-in approach adopted in the ***Second*** *R&O*, "the only more restrictive approach that could be adopted ... would be express written approval."[27] Because express written approval was the only more restrictive method open to the States, the Commission stated its intent to preempt any more restrictive limitations. In other words, the Commission stated it would preempt any requirement that a carrier obtain express written consent. With the introduction into the balance of the ***Central Hudson*** analysis ***by*** the Tenth Circuit, the Commission adopted an opt-out approach to all but third party release.

The States now may choose a more restrictive approach to CPNI notice and disclosure by adopting an opt-in approach in some or all of those instances where the Commission has adopted an opt-out approach. The Commission has appropriately adapted its preemption approach to take into account the additional options available to the States. **As** the Commission has clearly stated, and as is detailed above, it is entirely possible for a State to find based on the record produced in its investigation into carrier CPNI practices, that opt-in serves the substantial state interest of protection of the CPNI

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[25] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket Nos. 96-115, 96-149, *Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8061, ¶ 16 (1998) ("*Second R&O*").

[26] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket Nos. 96-115, 96-149, *Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd 14409, ¶ 112 (1999) ("*Reconsideration Order*").

[27] *Third R&O* at ¶ 70.

privacy rights and is no more extensive than necessary lo protect that interest. The Commission's decision lo presume preemplion where State's CPNI regulation required express written approval, and to not presume preemption where it is entirely possible a Slate's record may support an opt-in approach in reasonable. It is this issue: and not the cost issue that has driven the Commission's past and present decisions on preemption. Therefore, the Commission is not compelled to make any cost finding before changing its order regarding presumptive preemption.

Notably, it is no; the Commission's approach to preemption that causes any additional carrier expense from compliance with differing CPNI approaches. The carrier is free to utilize a consistent approach throughout its territory by adopting the least restrictive approach that satisfies all States in which it operates and applying that approach throughout its territory. Further, it is unclear to this Commission: that camers will be burdened with any additional cost burden of consequence if complying with differing CPNI regulations. Camers have presented no evidence in Arizona, or at the FCC. that complying with differing State CPNI regulation causes any consequential increase in cost.

## V. Conclusion

The Commission's decision to consider preemplion on a case-by-case basis with no presumption of preemption is reasonable considering *the* possible eventuality of Slate's being presented with a record indicating opt-in is a narrowly tailored approach properly balancing carriers' commercial speech and consumers' CPNI privacy interests. State CPNI regulation, even if more limiting than the FCC's, can co-exist with the FCC's without interfering with the FCC's goal of protecting consumer's privacy interests. The decision properly adapts *the* Commission's preemption approach lo fit its shift from an opt-out approach to an opt-in approach. The removal of the presumption correctly

recognizes that State commissions may now adopt a more limiting approach without requiring the consumer's express written approval. The carriers have not demonstrated any consequential financial burden of complying with differing Stale and Federal CPNl regulation and may negate any such financial burden by choosing an approach that satisfies both the Siaie and Federal regulations in its operating territory and applying that approach throughout. The ACC urges the Commission IO decline to reconsider its ***Third*** *R&O* as it pertains io the removal of a presumption of preemplion of inconsistent State CPNI regulations.

## CERTIFICATE OF SERVICE

I do hereby certify that I have this 24th day of December, served all parties to this action with a copy of the foregoing OPPOSITION TO PETITION FOR RECONSIDERATION by placing a true and correction copy of the same in the United *States* Mail, Postage prepaid, addressed *to* the parties listed below:

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